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No. 81-2363

In the Supreme Court of the United States

OCTOBER TERM, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,
Petitioners

v.

TERRI LEE HALDERMAN, et al.,
Respondents

REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES

LEROY S. ZIMMERMAN
Attorney General
By: *ALLEN C. WARSHAW
Deputy Attorney General
Chief, Special Litigation Section
ANDREW S. GORDON
ROBERT B. HOFFMAN
DEBRA K. WALLET
Deputy Attorneys General
Attorneys for Petitioners
**Counsel of Record*

Office of Attorney General
1641 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2344

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REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES

At the invitation of the Court, the United States filed a brief expressing its view on the certiorari petition. This brief responds to arguments raised there.

The United States concurs "that the court of appeals erred in requiring [petitioners] to proceed by way of a motion under Fed. R. Civ. P. 60." Brief at 9. It agrees that this Court's opinion in *Maggio v. Zeita*, 333 U.S. 56 (1948), has been "improperly distinguished." *Id.* Nonetheless, the United States suggests that affirmance was proper. Their reasoning is unpersuasive.

First, it joins Respondents Halderman, et al., in arguing that petitioners' inability to comply with the District Court order is not fairly included in the question presented to this Court. That it is has been demonstrated in Petitioners' Reply Brief at 2-3. That discussion is equally applicable here.

Equally mystifying is the Government's view that even if petitioners were not able to comply prior to the contempt finding, they were able to do so afterwards. This argument misconstrues the district court's opinion and order. Simply put, the District Court neither enjoined nor declared unconstitutional[1] the state law impedi-

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[1] The United States reluctantly agrees that "[t]he district court's order did not contain a declaration to this effect. . . ." Brief at 10 n. 6.

ment to compliance.[2] It simply held petitioners in contempt, without altering at all their ability to comply.

Finally, the United States errs in suggesting that other monies were available or that the District Court so found. The District Court noted that other monies had been used in other years, under the authority of other appropriation acts. That the operative appropriation here is unequivocal on the non-availability of other funds: "[i]t is the intent of the General Assembly . . . that no other funds of the Commonwealth be spent for these functions." (Pet. App. 59a) In light of that language, petitioners were not free, as they had been in prior years, to use general appropriations to fund the masters. Thus, this language clearly disposes of the United States' attempt to distinguish *Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978), *appeal dismissed*, 440 U.S. 942 (1979), and *Burd v. Department of Transportation*, 443 A.2d 1197 (Pa. Commonwealth Ct. 1982). See Brief at 12-13.

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[2] Nor could it have. Indeed, in *New York State Association of Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980), the Second Circuit rejected the precise argument made here by the United States. In so doing, the Second Circuit specifically found inapplicable:

> cases which hold that state action, or inaction, cannot defeat a constitutional or federally created right. *See e.g., State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 444 U.S. 658, 99 S.Ct. 3055, 61 L.Ed. 823 (1979); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed. 586 (1971). The cases appellees [and the United States here] cite did not, however, involve the remedy ordered in this case: that a state official expend state funds for a purpose expressly disallowed by the state legislature.

Id.

CONCLUSION

For the foregoing reasons, and for those set forth in this petition and in their reply brief, petitioners respectfully request that this Court issue a writ of certiorari in this case.

LEROY S. ZIMMERMAN
Attorney General

By: *ALLEN C. WARSHAW
Deputy Attorney General
Chief, Special Litigation Section
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